



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

CAUSE NO. 73 OF 2018 CONSOLIDATED WITH CAUSES NOS. 37 – 39 OF 2018, CAUSES NOS. 2309 – 2320 OF 2017, CAUSES NOS. 2272 – 2274 OF 2017, CAUSE NO. 2270 OF 2017 AND CAUSE NO. 2252 OF 2017

ROSILINDA OKANDA OLUOCH..... 1ST CLAIMANT

MACYLNE KERUBO MIKURO..... 2ND CLAIMANT

JULIA NJERI WANJUKI..... 3RD CLAIMANT

DAMARIS KATANU MULI..... 4TH CLAIMANT

JOYCE WANJIKU NJENGA..... 5TH CLAIMANT

MAUREEN MWIKALI MAEMA..... 6TH CLAIMANT

MONIKA WANJIKU IRUNGU..... 7TH CLAIMANT

LINET KHASIALA SHIKOLI..... 8TH CLAIMANT

MERCY MWIKALI WAMBUA..... 9TH CLAIMANT

PERIS WANJIKU KIBANDI..... 10TH CLAIMANT

MONICA WANJIKU NGUGI..... 11TH CLAIMANT

DANIEL AMWAYI ESHIWANI..... 12TH CLAIMANT

ANNASTACIA SYOBUA KANUNA..... 13TH CLAIMANT

FAITH MWENDE MUNYOKI..... 14TH CLAIMANT

MARY MUMBUA MUSYOKI..... 15TH CLAIMANT

STELLA KARIMI KINYUA..... 16TH CLAIMANT

DINAH KWAMBOKA OMARIBA..... 17TH CLAIMANT

JOYCE WAIRIMU NJERI..... 18TH CLAIMANT

BRIDGET NGULA MBINDYO..... 19TH CLAIMANT

BEATRICE WAIRIMU KAMANDE..... 20TH CLAIMANT

MARY MBATHA JAMES..... 21ST CLAIMANT
FRIDAH KERUBO OKIRIGITI..... 22ND CLAIMANT
ANGELLAH MWENDE KIKUVI..... 23RD CLAIMANT
EVANS MAGANI INDASIO..... 24TH CLAIMANT
LUCY NJERI KAMAU..... 25TH CLAIMANT
FLORENCE MUENI NZAU..... 26TH CLAIMANT
VERONICA KYALO..... 27TH CLAIMANT
ANGELINA MUENI MUTHAMI..... 28TH CLAIMANT
FENNEY KWAMBOKA MIRUKA..... 29TH CLAIMANT
GRACE MUMBUA KIOKO..... 30TH CLAIMANT
ANN WANJIKU KURIA..... 31ST CLAIMANT
ROSE KAMENE MUSAU..... 32ND CLAIMANT
METRINE NAMALWA MUILA..... 33RD CLAIMANT
JAMINAH KALEKYE MUIA..... 34TH CLAIMANT
MARY KALONDU MUSYIMI..... 35TH CLAIMANT
LEAH MMBONE KIVAMBO..... 36TH CLAIMANT
FAITH KARIMI..... 37TH CLAIMANT
CATHERINE GACHERI KUBANIA..... 38TH CLAIMANT
PHELLY AWUOR AMBONGO..... 39TH CLAIMANT

VERSUS

STYLE INDUSTRIES LIMITED..... RESPONDENT

JUDGMENT

The Claimants, Rosalinda Okanda Oluoch and 38 others moved this Court on various dates in 2017 and 2018 against the Respondent, Style Industries Limited for unfair and irregular termination of their employment on account of redundancy. They seek reinstatement, general damages for unfair termination, costs and interests. The Causes were consolidated on 17th January 2019 and Cause No. 73 of 2018 selected as the lead file.

The Claimants aver that they were employed by the Respondent on diverse dates before the Respondent terminated their services with effect from 31st May 2017 for one Claimant, 30th June 2017 for some of them and 31st July 2017 for the rest. They aver that prior to termination of their employment, work was going on as usual and there was not a sign of the company experiencing challenges in terms of slow business. The claimants further aver that they were not informed of any challenges that the company was facing.

The claimants aver that the Respondent's Human Resource Manager summoned each of them to inform them that their employment had come to an end. They aver that the Redundancy declared by the Respondent was not justified. Further that the Respondent did not give them one month's notice prior to termination as required under Section 40(1)(b) of the Employment Act. That it also did not notify the labour officer in charge of the area of the reasons for and the extent of the redundancy prior to the intended date of termination. They further aver that the Respondent did not consider any criteria in selecting the Claimants to be declared redundant or consult them as required by the ILO Convention 158 on Termination of Employment and Recommendation, 1982.

They have annexed to their claims their respective witness statements, termination letters and pay slips. They aver that they have demonstrated they were only informed of termination of their employment when the letters of termination had already been signed. They

thus contend that the termination was abrupt. They aver that they are suffering great harm and prejudice as a result of the unfair termination of unfairly terminating their employment and that the Respondent has refused to pay and or settle their Claims. It is their case that their termination on account of redundancy was unfair, irregular and hence null and void.

The Respondent filed a Memorandum of Response dated 25th June 2019, almost two years after the filing of the claims, by consent of parties. It avers that by the time the Claimants were declared redundant, they were earning various amounts of wages as per the minimum wage order inclusive of house allowance. It avers that sometime in May 2017, it held a meeting with employees from various departments and informed them of its intention to declare some of the employees redundant due to the economic recession in the country and the resultant high inflation in the past year. That in the said meeting, it was agreed that the employees who were to be declared redundant were to be paid their terminal benefits including severance and notice pay based on their current salary. That it then issued the Claimants with redundancy notices on 30th June 2017 and the redundancy was to take effect as from 31st July 2017. That it tabulated the redundancy benefits and requested the Claimants to confirm whether the tabulations were accurate as per the agreement. That they were paid the said benefits which they accepted as full and final settlement of their dues. That they were further paid their salaries up to 31st July 2017 as well as one month's salary in lieu of notice.

The respondent contends that it complied with the statutory provisions. That although the Claimants resisted the redundancy, they failed to give any alternative for salvaging the organization from closing shop. That every relevant detail was put in writing and the Claimants cannot now claim that they were not accorded access to the information. It avers that the Claims are bad in law and disclose no cause of action against it. That the Claimants cannot claim compensation as the process was above board and all stakeholders were consulted prior to separation. The Respondent prays that all the prayers be disallowed and the Claims be dismissed with costs.

Evidence

ROSILIDA OKANDA OLUOCH testified on behalf of all the Claimants and produced and relied on documents provided by herself and the other Claimants. She stated that she was employed as a general worker in the production department. That she was called to the office and issued with a letter of termination but was not issued with any reason for termination. That she was informed she had to sign the letter to get her money and that it is after she signed that she realised that the document was a termination letter. During cross examination, she stated that the Respondent used to experience seasonal fluctuation in business and that at times the company would perform well and at other times lay off its employees.

RW1, DANIEL ONGOYA, the Respondent's Head of Industrial Relations and Administration testified that a notice was placed on the notice board and others served personally on the employees. During cross examination, he stated that the Respondent had not filed any documents to prove reduction in sales in May-July 2017. He also testified that there were no records in court to prove the alleged meeting of May 2017 took place and that notification was sent to the Ministry of Labour through the Sub-County Labour Office at Industrial Area on 29th May 2017.

Claimants' Submissions

The Claimant submits that it is noteworthy that the Respondents business did not stop as production continued even after redundancy was declared. That the evidence that the Respondent abolished entire sectors like packaging cannot be believed because some people must have been left serving in those sectors.

They submit that the law on termination of employment on account of redundancy is found at **Section 40(1) of the Employment Act**, case law and **Article 13 of Recommendation No. 166 of the ILO Convention No. 158 – Termination of Employment Convention, 1982**.

That the conditions set out in the said provisions are mandatory because redundancies affect workers' livelihoods and so the employer must satisfy all of the conditions. That as was explained in the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** the conditions are conjunctive, meaning that they all have to be satisfied for termination on account of redundancy to be lawful and fairly implemented.

The Claimants submit that the Respondent only issued termination notices under section **40(1)(f) of the Employment Act** but never gave them notice under section **40(1)(b)**. They urge this Court to find that without evidence, the Respondent never issued a notice under the said section 40(1)(b). They rely on the Court of Appeal decision in **Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others [2018] eKLR** where the court declined a bare assertion that service was made and reasons for redundancy given and concluded that in the absence of documentary proof, there was no service and therefore any alleged notice was invalid.

It is submitted by the Claimants that the court in the **Gladys Muthoni case** further expressed that redundancies must further be substantially justified, which is a heavy burden of proof placed upon the employer. That the Respondent herein did not justify the redundancies but made assertions of experiencing operational difficulties and reduced sales without proof thus did not discharge its burden of proof. That without any documents showing that the Respondent had unsold stock and that profits had reduced, it would be difficult for the court to determine whether the Respondent genuinely believed the economic situation existed that caused the Respondent to terminate the Claimants as required under **section 43(2) of the Employment Act**.

The Claimants submit that Maraga J. in the **Kenya Airways Limited case above** emphasised that consultation before termination on account of redundancy must be real and not cosmetic while citing with approval the New Zealand case of **Cammish v Parliamentary Service (1996) 1 ERNZ 404** stating thus:

“Consultation has to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then)

decide what is to be done.”

That the Respondent did not consult them. That they came to learn that their services were no longer required on the same day they were terminated. That there is no evidence before court that they were consulted and that the Respondent further breached their right to fair labour practices as under **Article 41 of the Constitution**.

The Claimants contend that they have proved unfair termination of their employment. That the Respondent has not discharged its burden of proof on the reason(s) for termination or that the said reason(s) were fair and valid and in accordance with fair procedure. That they are therefore entitled to compensation equivalent to twelve months' wages based on their individual salaries at the time of dismissal as under **Section 49(1)(c) of the Employment Act**. They rely on the decision in **Angela Shiukuru Ilondanga v Airtel Networks Kenya Limited [2018] eKLR** where the Court awarded the claimant 12 months' gross salary for unfair termination on account of false redundancy. The court considered that the claimant never contributed to her predicament, that she desired to continue in employment, that she had a clean record of service that earned her promotions, that she had been employed on permanent and indefinite service in view of her good performance and, the aggravating factors that she was terminated abruptly and at a time she had an outstanding loan.

Respondents' Submissions

The Respondent submits that it was not the first time it was carrying out a redundancy exercise. That by sending a copy of notification to the labour office it had demonstrated that it was aware of the requirements of Section 40 of the Employment Act. Further, that the Claimants have not rebutted the letter to the Labour office and the response thereof where the ministry advised the Respondent to follow the provisions of section 40. It relies on the case of **Banking Insurance and Finance Union (Kenya) v Kirinyaga District Co-Operative Union Ltd SC Another [2014] eKLR** stated:

"The purpose of the notification is to enable the Union and the Labour Officer to understand and appreciate the purpose of the redundancy. It is aimed at calling into participation, the Union and Labour Official, to ensure the other provisions of Section 40(1) are observed in carrying out the redundancy. It is further meant to ensure that the employees affected are compensated, on the minimum, as provided in the Employment Act or the CBA and that the exercise is being carried out in a transparent manner and does not amount to unfair labour practice."

The Respondent relies on the case of **Gerrishom Obayo v Dsv Air and Sea Ltd Cause No. 2104 of 2017** and submits that the claimants have not pleaded and demonstrated any unfairness on termination and that the termination was well articulated and justified by RW1.

Analysis and Determination

The first issue for determination is whether the Respondent adhered to procedure under Section 40(1) of the Employment Act before terminating the services of the Claimants on account of redundancy. The second issue for determination is whether the termination of the Claimants' employment on account of redundancy was unfair, irregular and hence null and void. The third issue for determination is whether the Claimants are entitled to the reliefs sought in their claims.

On whether the Respondent adhered to procedure, this Court is guided by the holding in the case of **Josphat Ulenje Mando v ARM Cement (Formerly Known as Athi River Mining Ltd) [2018] eKLR** that:

"It is now settled that redundancy is a legitimate form of termination of employment but there are stringent conditions to be found in Section 40 of the Employment Act that must be observed. These conditions have to do with adequate notice to the affected employees, their Trade Union and the Labour Office, a fair selection criteria based on length of service skill and reliability as well as payment of terminal dues.

*Regarding the issue of notice, the Court of Appeal in **Thomas De La Rue v David Opondo Omutelema [2013] eKLR** and **Kenya Airways v Aviation & Allied Workers Union of Kenya & 3 others [2014] eLKR** confirmed that in cases of redundancy, two separate and distinct notices are required. The first which is the redundancy notice is issued to all employees likely to be affected by the redundancy and the second is a termination notice specific to each employee individually.*

The requirement on selection of employees to be sent home on account of redundancy is intended to assure objectivity and fairness in the process.

From the evidence on record, the Respondent made no attempt to comply with any of the conditions set under Section 40 of the Employment Act. This renders the termination of the Claimant's employment substantively and procedurally unfair and he is entitled to compensation."

In this case, the Respondent did not demonstrate that it notified the Claimants about the redundancy before issuing them with termination notices. The notices they received were termination notices. They were paid one month's salary in lieu of notice and released immediately.

The respondent did not comply with any of the provisions under Section 40 of the Act and the redundancies are therefore deemed to be unfair termination under Section 45 of the Employment Act.

In the **Gerishom Mukhuti Obayo case above**, the court held that the redundancy of the claimant was unprocedural and therefore unfair and that since redundancy procedure as set out in law is mandatory, where an employer fails to do so, the termination becomes an unfair termination within the meaning of **Section 45 of the Employment Act**.

The claimants prayed for several heads of remedies. RW1 testified that the respondent paid salary for days worked, notice, severance pay and outstanding leave.

The claimants' prayer for reinstatement is unavailable as they have not demonstrated exceptional circumstances to warrant the orders of reinstatement.

Having found the redundancy unprocedural, I award each of the claimant three (3) months' salary as compensation. The respondent shall pay the claimant's costs and interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF JULY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE